

**BEFORE THE EXPERT PANEL**

**FTSS-2505-1057**

**IN THE MATTER** of the Fast-track Approvals Act 2024

**AND**

**IN THE MATTER** of an application by NTP Development Holdings Limited for the Pound Road Industrial Development

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**Memorandum of Counsel for the Christchurch City Council responding to legal questions associated with Transportation in Appendix 1 of Minute 11 and Minute 14**

4 March 2026

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## If the Panel Pleases:

1. This memorandum of counsel for Christchurch City Council (**Council**) is filed in accordance with paragraph [10](c) of Minute 14 of the Expert Panel. It responds to the Applicant's Memorandum to the Expert Panel dated 17 February 2026 which made legal submissions associated with Transportation (**Applicant's Memorandum**).
2. The purpose of this memorandum is to:
  - (a) Provide counsel's opinion on the proper interpretation of sections 81, 83 and 84A of the Fast-track Approvals Act 2024 (**FTAA**) when setting conditions. It answers the following questions from the Expert Panel:
    - (i) Subject to the requirement that conditions must not be any more onerous than necessary (s83), and be in accordance with s84A, whether the Expert Panel is limited to imposing conditions offered by the Applicant and:
      - (1) Only conditions that address adverse impacts that are of sufficient significance to be disproportionate to the regional/national benefits;  
or
      - (2) Only conditions that address any adverse impacts that are assessed to be significant; or
      - (3) Any conditions that address any adverse impacts, regardless of their significance?<sup>1</sup>
    - (ii) What is the significance/meaning of the verb "ensure" in s84A(1) of the FTAA?<sup>2</sup>
  - (b) Discuss whether a "condition precedent" (being a condition whereby the Proposal could not proceed past a certain point or date until intersection upgrades were constructed), is a legally available method or condition for limiting significant adverse transportation impacts?<sup>3</sup>
  - (c) What is the relevance and correct interpretation of s84A in relation to the delivery, timing and funding of intersection upgrades?

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<sup>1</sup> Paragraph [10](b)(ii) of Minute 14.

<sup>2</sup> Paragraph [10](b)(i) of Minute 14.

<sup>3</sup> Paragraph [6](a)(e) of Minute 14.

## **The proper interpretation of sections 81, 83 and 84A of the FTAA when setting conditions**

3. The Applicant's Memorandum submits that the FTAA (particularly sections 81, 83 and 84A) limits the Expert Panel to imposing:
  - (a) Conditions offered by the Applicant; and/or
  - (b) Conditions, where not offered by the Applicant, that address adverse impacts that are of sufficient significance to be disproportionate to the regional/national benefits (see for example paragraph 28 of the Applicant's Memorandum).
4. The Council differs. The Council submits that the Expert Panel may impose:
  - (a) Conditions offered by the Applicant; and/or
  - (b) Any conditions that address any adverse impacts, regardless of their significance, subject to the requirement that conditions must not be any more onerous than necessary under s83 of the FTAA, be in accordance with s84A of the FTAA (in relation to infrastructure conditions), and meet the usual RMA requirements for valid conditions.

### Provisions and requirements for setting conditions

5. Amended section 81 and new section 84A of the FTAA came into force on 17 December 2025 under the the Fast-track Approvals Amendment Act 2025 (**Amendment Act**). Both section 81 as amended and new section 84A apply to the Pounds Road Industrial Development Proposal (**Proposal**) pursuant to the transitional provisions of clause 6(2)(b) schedule 1 of the FTAA because the Proposal had not yet been decided under section 81 of the FTAA when Amendment Act came into force.
6. Standard statutory interpretation principles apply. The meaning of the words used in a statute must be ascertained from the text of the statute in light of its purpose and its context.<sup>4</sup> The natural and ordinary meaning of the text is the starting point, only to be displaced if a less usual meaning is required to better fit the wider context of an enactment,<sup>5</sup> or to better fulfil the purpose or policy of that enactment.<sup>6</sup>
7. The purpose of the FTAA is stated in section 3 as follows:

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<sup>4</sup> Section 10 of the Legislation Act 2019.

<sup>5</sup> *Agney v Pardington* [2006] 2 NZLR 520 (CA).

<sup>6</sup> *Waitakere City Council v Khouri* [1999] 1 NZLR 415 (CA); *Commissioner of Inland Revenue v Alcan New Zealand Ltd* [1994] 3 NZLR 439 (CA).

*"The purpose of this Act is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits."*

8. The FTAA provides a bespoke process for the Expert Panel to consider and make decisions on substantive applications for approvals like the Proposal.
9. Section 81 of the FTAA provides for decision-making by the Expert Panel. Relevantly, section 81 states:

**81 Decisions on approvals sought in substantive application**

- (1) A panel must, for each approval sought in a substantive application, decide whether to—
  - (a) grant the approval and set any conditions to be imposed on the approval; or
  - (b) decline the approval.
- (2) For the purpose of making the decision, the panel—
  - ...
  - (b) must apply the applicable clauses set out in subsection (3) (see those clauses in relation to the weight to be given to the purpose of this Act when making the decision):
    - ...
    - (d) must comply with section 83 in setting conditions:
    - (ea) may impose conditions under section 84A:
    - (f) may decline the approval only in accordance with section 85.
- (3) For the purposes of subsection (2)(b), the clauses are as follows:
  - (a) for an approval described in section 42(4)(a) (resource consent), clauses 17 to 22 of Schedule 5:
    - ...
- (4) When taking the purpose of this Act into account under a clause referred to in subsection (3), the panel must consider the extent of the project's regional or national benefits.

[counsel's underlining for emphasis]

10. Section 83 of the FTAA is relevant to condition setting generally under the FTAA. It states:

**83 Conditions must be no more onerous than necessary**

When exercising a discretion to set a condition under this Act, the panel must not set a condition that is more onerous than necessary to address

the reason for which it is set in accordance with the provision of this Act that confers the discretion.

[counsel's underlining for emphasis]

11. Notably, section 83 does not prevent the Expert Panel from setting conditions that are onerous per se, but rather that a condition cannot be "*more onerous than necessary*".
12. Newly inserted section 84A is relevant to imposing conditions that relate to infrastructure that the Proposal will rely on. It states:

#### **84A Conditions relating to infrastructure**

- (1) The panel may set conditions to ensure that the infrastructure in the project area or other infrastructure the project will rely on is or can be made adequate to support—
  - (a) the project; or
  - (b) the stage of the project to which the application relates.
- (2) This section applies in addition to, and does not limit, any other powers to set conditions under this Act.
- (3) To avoid doubt, a condition set under this section may impose an obligation on the applicant only.

[counsel's underlining for emphasis]

13. Subsections (3) to (5) of section 85 of the FTAA provide the Expert Panel a discretionary ability to decline an approval in the following terms:

#### **85 When panel must or may decline approvals**

...

- (3) A panel may decline an approval if, in complying with section 81(2), the panel forms the view that—
  - (a) there are 1 or more adverse impacts in relation to the approval sought; and
  - (b) those adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits that the panel has considered under section 81(4), even after taking into account—
    - (i) any conditions that the panel may set in relation to those adverse impacts; and
    - (ii) any conditions or modifications that the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for those adverse impacts.
- (4) To avoid doubt, a panel may not form the view that an adverse impact meets the threshold in subsection (3)(b) solely on the basis that the

adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document that a panel must take into account or otherwise consider in complying with section 81(2).

- (5) In subsections (3) and (4), **adverse impact** means any matter considered by the panel in complying with section 81(2) that weighs against granting the approval.

[counsel's underlining for emphasis]

14. Section 85(3)(b) prevents the Expert Panel from declining an approval unless a view is formed that the adverse impacts "*are sufficiently significant*" to be out of proportion to the project's regional or national benefits. It is implicit that approval cannot be declined even where adverse impacts are found to be significant, provided that those impacts are not "*sufficiently significant*" to be out of proportion to the project's benefits.
15. Section 81(2)(b) and 81(3)(a) of the FTAA (see paragraph 9 above) requires the Expert Panel to apply clauses 17 to 22 of Schedule 5 of the FTAA when making a decision on a resource consent. For setting conditions on a resource consent, clause 18 of Schedule 5 confirms that RMA provisions relevant to setting conditions apply to the Expert Panel's decision-making:

### **18 Conditions on resource consent**

When setting conditions on a consent, the provisions of Parts 6, 9, and 10 of the Resource Management Act 1991 that are relevant to setting conditions on a resource consent apply to the panel, subject to all necessary modifications, including the following:

- (a) a reference to a consent authority must be read as a reference to a panel; and
- (b) a reference to services or works must be read as a reference to any activities that are the subject of the consent application.

[counsel's underlining for emphasis]

16. Sections 108 and 108AA in part 6 of the RMA are particularly relevant to setting conditions on resource consents. While these sections are not set out in full here, section 108AA(1)(b) mentions requirements for conditions where an applicant does not agree to a condition under subclause (1)(b):

### **108AA Requirements for conditions of resource consents**

- (1) A consent authority must not include a condition in a resource consent for an activity unless—
- (a) the applicant for the resource consent agrees to the condition; or
- (b) the condition is directly connected to 1 or more of the following:

- (i) an adverse effect of the activity on the environment:
- (ii) an applicable district or regional rule, or a national environmental standard:
- (iii) a wastewater environmental performance standard made under section 138 of the Water Services Act 2021:
- (iv) a stormwater environmental performance standard made under section 139A of the Water Services Act 2021:
- (v) an infrastructure design solution; or
- (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

(2) Subsection (1) does not limit this Act or regulations made under it.

17. Case law relevant to setting conditions under section 108 of the RMA remains relevant when setting conditions under the FTAA. Conditions must comply with the *Newbury* requirements which is that they must:

- (a) Be for a resource management purpose, not an ulterior one;
- (b) Fairly and reasonably relate to the development authorised by the resource consent;
- (c) Not be so unreasonable that no reasonable planning authority could have imposed them.<sup>7</sup>

18. RMA case law has also confirmed that in order to be valid, conditions must:

- (a) Be certain, not lacking in finality;<sup>8</sup>
- (b) Be capable of enforcement;<sup>9</sup>
- (c) Not require the consent of a third party.<sup>10</sup>

<sup>7</sup> *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149, [2007] NZRMA 137 at [20] and [61]- [68], adopting the approach in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (UKHL).

<sup>8</sup> *Bitumix Ltd v Wellington Borough Council* [1979] 2 NZLR 57 (HC), followed in *Wood v Selwyn District Council* (C35/94).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Fisher v Taupo District Council* (W18/95)

Whether the Expert Panel is limited to imposing conditions offered by the Applicant, and only conditions that address adverse impacts that are of sufficient significance to be disproportionate to the regional/national benefits?

19. The Council agrees with the Applicant that the Expert Panel is able to impose conditions offered by the Applicant. Offered or volunteered conditions are anticipated by section 108AA(1)(a) of the RMA (see paragraph 16 above).
20. The Council does not agree with the Applicant's view that where the Applicant has not offered a condition, then the Expert Panel can only impose conditions that address adverse impacts that are of sufficient significance to be disproportionate to the regional/national benefits.
21. The Applicant's interpretation would mean that the FTAA authorises activities to generate significant adverse impacts as long as they are not sufficiently significant to be out of proportion to regional or national benefits, and not have conditions that would mitigate significant adverse impacts, despite there being appropriate and reasonable conditions that could (otherwise) be validly imposed under the RMA and sections 83 (not more onerous than necessary) and 84A (infrastructure) of the FTAA.
22. The Applicant's view seems to mistakenly conflate the FTAA test for **declining** approval with the power to **impose conditions**.
23. The Expert Panel may **decline** an approval under section 85(3) of the FTAA where adverse impacts are "*sufficiently significant to be out of proportion to the project's regional or national benefits*" (see paragraph 13 above). The phrase "*sufficiently significant to be out of proportion to the project's regional or national benefits*" does not appear anywhere else in the FTAA, nor does it appear in the RMA.
24. Importantly, none of the statutory provisions that apply to **imposing conditions** mention or otherwise impose any limitation that conditions may only address adverse impacts that are "*sufficiently significant to be out of proportion to the project's regional or national benefits*". In particular:
  - (a) Section 81(1)(a) of the FTAA confirms that that the Expert Panel can decide to grant an approval and "*set any conditions to be imposed on the approval*". While section 81(1)(b) mentions the Expert Panel can decide to decline approval, there is nothing in subclauses (1)(a) or (1)(b) that require the setting of any conditions to be limited to only addressing adverse impacts that are "*sufficiently significant to be out of proportion to the project's regional or national benefits*".

- (b) Section 81(3)(a) of the FTAA specifically refers to clause 17 to 22 of Schedule 5 of the FTAA. Clause 18 imports the RMA provisions relevant to setting conditions into the FTAA (see paragraphs 14 and 16 above). There is nothing in the RMA or case law that limits conditions to only address adverse impacts that are "*sufficiently significant to be out of proportion to the project's regional or national benefits*".
- (c) Section 81(2)(d) of the FTAA mentions that the Expert Panel "must" (mandatory) comply with section 83 in setting conditions. Section 83 does not limit condition setting to only address adverse impacts that are "*sufficiently significant to be out of proportion to the project's regional or national benefits*". Rather, section 83 limits condition setting in an entirely different way: conditions cannot be set that are "*more onerous than necessary*" to address the reason it is set in accordance with the provision of the FTAA that confers the discretion (see paragraph 10 above). It is implicit in section 83 that conditions can still be onerous, just not more onerous than necessary to address the reason for which it is set in accordance with the provision of the FTAA that confers the discretion. Accordingly, taking section 84A of the FTAA as an example:
- (i) The reason for a section 84A condition is to "*ensure that the infrastructure in the project area or other infrastructure the project will rely on is or can be made adequate to support...the project*".
- (ii) Section 83 then requires that a section 84A condition cannot be "*more onerous than necessary*" to "*ensure that the infrastructure in the project area or other infrastructure the project will rely on is or can be made adequate to support...the project*".

Paragraph 43(a) of the Applicant's Memorandum incorrectly states that section 83 requires that conditions be "*no more restrictive than required to meet the purpose of the FTAA*". However, section 83 makes no mention of the **purpose** of the FTAA. Rather, section 83 ensures that conditions are no more onerous than necessary to address **the reason for which it is set in accordance with the provision that confers the discretion** (such as s84A).

- (d) Section 81(2)(ea) mentions that the Expert Panel "may" (discretion) impose conditions under section 84A. Section 84A provides for conditions relating to infrastructure, with nothing in the wording of the section imposing a limitation that

conditions may only address adverse impacts that are sufficiently significant to be disproportionate to the project's regional or national benefits.

25. While the power to **decline** an approval under section 85(3) of the FTAA mentions that the Expert Panel must take into account conditions (whether set by the Expert Panel or offered by the Applicant), the phrase "*taking into account*" in section 85(3) does not limit the Expert Panel's ability to impose conditions, nor does it conflate the FTAA test for declining approval with the power to impose conditions. The phrase "*taking into account*" simply confirms that the discretionary power to decline consent can only be exercised if, even accounting for the imposition of conditions offered by the Applicant or set by the Expert Panel, the Panel still considers that "*adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits*".
26. This interpretation is consistent with Parliamentary intent as recorded in the Third reading of the Fast Track Approvals Bill which mentions (at paragraph 21):<sup>11</sup>

"A project can only be declined by an expert panel if it has adverse impacts that are sufficiently significant to be out of proportion to the project's regional or national benefits, even after taking into account any conditions that the panel may set in relation to those impacts; and any conditions that the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for those impacts."

[counsel's underlining for emphasis]

27. Parliamentary intent as recorded in the Third reading of the Fast Track Approvals Bill was that it is part of the role of the Expert Panel to set conditions "*the panel considers appropriate*".<sup>12</sup> The only tightening on the setting of condition on projects mentioned in the Third reading was that conditions "*are no more onerous than necessary*".<sup>13</sup>
28. Therefore, accounting for wider context of the FTAA and Parliamentary intent, it is submitted that where the Applicant does not offer a condition, the Expert Panel retains an ability to set any conditions that address any adverse impacts, regardless of their significance, provided the conditions satisfy standard RMA requirements for the validity of consent conditions including the *Newbury* requirements, and meet the section 83 FTAA requirement that conditions must not be any more onerous than necessary to

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<sup>11</sup> [Legislative Statement: Fast-track Approvals Bill Third Reading presented to the House of Representatives in accordance with Standing Order 272 J.17.](#)

<sup>12</sup> Ibid at paragraph 12.

<sup>13</sup> Ibid at paragraph 3e.

address the reasons for which it is set in accordance with the provision of the FTAA that confers the discretion (for example section 84A of the FTAA).

What is the significance/meaning of the verb "ensure" in s84A(1) of the FTAA?

29. The word "ensure" as used in section 84A(1) of the FTAA (see paragraph 12 above) is not defined in the FTAA.
30. The natural and ordinary meaning of "ensure" is to make something certain to happen.<sup>14</sup> Accordingly, section 84A is concerned to make certain to happen that the infrastructure the Proposal will rely on is, or can be made, adequate to support the Proposal. There is nothing in the context or purpose of the FTAA to suggest that the word "ensure" is intended to be given a meaning that departs from its natural and ordinary meaning. The meaning of the remainder of section 84A and whether it enables the use of a "condition precedent" is discussed below.

**Whether a "condition precedent" is a legally available method or condition for limiting significant adverse transportation impacts?**

31. A "condition precedent" remains a legally available method or condition for limiting significant adverse transportation impacts under the FTAA because:
  - (a) RMA provisions relevant to setting conditions (including section 108 of the RMA) apply to the FTAA;
  - (b) A condition precedent can be lawful under section 108 of the RMA;
  - (c) There was no Parliamentary intent to remove from the FTAA the lawful ability to impose a condition precedent under the RMA;
  - (d) A condition precedent can be lawfully imposed under sections 83 and 84A of the FTAA; and
  - (e) A condition precedent was recently considered lawful in a draft decision by a differently constituted Expert Panel on another FTAA proposal.
32. Each of the above points are discussed further below.

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<sup>14</sup> Meaning of "ensure" in the [Cambridge online dictionary](#) and [Collins online dictionary](#).

## Lawfulness of condition precedent under the RMA

33. As mentioned at paragraphs 15 and 16 above, the RMA provisions relevant to setting conditions (including section 108 of the RMA) apply to the Expert Panel under the FTAA.
34. Case law has confirmed that a condition precedent imposed under section 108 of the RMA can be lawful if:
- (a) The condition does not purport to apply prior to the consent having legal effect. This is easily addressed by ensuring the condition defers the ability to carry out an activity permitted by the consent, rather than deferring the consent itself.<sup>15</sup>
  - (b) The condition does not require the consent holder to do something it cannot lawfully do. This can be avoided by appropriate drafting. For example, although a condition cannot require a developer to close a highway (because that would lie outside of the developer's powers), it could prevent a development from proceeding until the highway is closed by the road controlling authority. As the High Court mentioned in *Westfield (New Zealand) v Hamilton City Council*:<sup>16</sup>

"On the other hand, a condition precedent which defers the opportunity for the Applicant to embark upon the activity until a third party carries out some independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within the powers of the developer: *Grampian Regional Council v City of Aberdeen* [1983] P&CR 633, 636 (HL)."
  - (c) The condition precedent must not give rise to undue uncertainty as to the effects of the works.<sup>17</sup> This issue can be addressed by expert evidence that a proposed intersection upgrade will be effective in appropriately mitigating adverse effects.<sup>18</sup>
  - (d) A condition precedent cannot frustrate the grant of consent. This can be avoided by the Expert Panel being satisfied there is a reasonable prospect the intersection upgrade will occur. In *Hildeman v Waitaki District Council*,<sup>19</sup> a condition precedent was held to be inappropriate where neither the Council nor

<sup>15</sup> *Director-General of Conservation v Marlborough District Council* (2004) ELRNZ 254.

<sup>16</sup> *Westfield (New Zealand) v Hamilton City Council* [2004] NZRMA 556 (HC) at [56].

<sup>17</sup> *Laidlaw College Inc v Auckland City Council* [2011] NZEnvC 248.

<sup>18</sup> In *Laidlaw College Inc v Auckland Council*, although the parties' traffic engineers agreed that additional mitigation works were required so an intersection could accommodate traffic generated by a proposed Mitre 10 Mega, there remained uncertainty as to whether the relevant road controlling authority (Auckland Transport) would consider the mitigation to be effective. Given this uncertainty, the Court rejected the applicant's proposal that obtaining Auckland Transport's approval to the mitigation works be a condition precedent to the development occurring.

<sup>19</sup> *Hildeman v Waitaki District Council* [2010] NZEnvC 51.

the applicant was in a financial position to undertake the intersection upgrade required by a proposed condition precedent. The Court considered that as there was no commitment to the necessary intersection upgrade, a condition precedent would effectively render the consent futile. The consent was declined because there was no means of overcoming the traffic effects.<sup>20</sup> However, as shall be discussed below, new section 84A of the FTAA appears to remove the need to demonstrate a commitment to an infrastructure upgrade at the time a proposal is being considered, instead leaving it open for approvals to be granted while project proponents and third party infrastructure providers negotiate and work through future infrastructure provision.

35. A condition precedent must also meet the general common law requirements for the validity of conditions.

Parliament did not intend to remove the ability to impose a condition precedent

36. New section 84A was not inserted into the FTAA to prevent the use of condition precedents as an available method for limiting adverse impacts from a lack of infrastructure to support a proposed development. Rather, section 84A was inserted so that applications can be granted **conditionally** without planned future infrastructure, for example, conditionally on the completion of roading upgrades. This intent can be clearly seen from Parliament records as outlined below.
37. The Legislative Statement for the First Reading of the Fast-track Approvals Act Amendment Bill (**Amendment Bill**) mentions (at paragraph 17):<sup>21</sup>

"The Bill...explicitly sets out that approvals can be granted conditional on subsequent infrastructure provision (clause 46) to make clear that approvals can be given pending continued resolution of local servicing issues".

[counsel's underlining for emphasis]

38. During the First Reading on 6 November 2025, Chris Bishop mentioned that the Amendment Bill:<sup>22</sup>

"proposes that applications can be granted conditionally without planned future infrastructure, such as roads and services being completed".

[counsel's underlining for emphasis]

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<sup>20</sup> *Hildeman v Waitaki District Council* [2010] NZEnvC 194.

<sup>21</sup> [Legislative Statement: Fast-track Approvals Amendment Bill First Reading presented to the House of Representatives in accordance with Standing Order 272 J.17.](#)

<sup>22</sup> [Hansard - New Zealand Parliament - Thursday, 06 November 2025.](#)

39. Accordingly, the intent of section 84A was to enable applications to be granted conditionally on subsequent infrastructure (such as roads and services) being **provided and completed**.
40. The Departmental Report on the Fast-track Approvals Amendment Bill published on 4 December 2025 (**Departmental Report**) comments on submissions about the new section 84A at paragraphs 192 to 200.<sup>23</sup> The Departmental Report records the submission from the Panel Convener and Associate Panel Convener which sought clarification as to whether the new section 84A was intended to allow conditions to bind third parties (which is contrary to long established legal principles) or intended to allow a condition precedent (which is considered unnecessary because the power to do so already exists):<sup>24</sup>

“The panel conveners request that the Committee clarify the drafting of this provision to be clearer as to the nature of this proposed power. In particular whether:

- (a) it is intended to provide a power to impose a condition on a party other than the applicant, such as the local authority (and if so, on what basis); or
- (b) It is intended to provide the power to impose a condition deferring the implementation of the consent until such time as adequate infrastructure is being provided by a third party (and if so, under what constraints in terms of timing etc)?

The panel conveners consider that the first option is contrary to long-established legal principle that third parties cannot be subject to conditions imposed on a consent for which they are not the applicant. The second option is considered unnecessary in respect of resource consents that would otherwise be issued under the RMA because the power to impose such conditions already exists.”

Panel Convener and Associate Panel Convener”

41. Notably, the Departmental Report records the Officials' comment on submissions on section 84A as not intending to disrupt existing case law. There was no intention to empower the Expert Panel to impose legal obligations or costs on a third party. Rather, there was clear intent to enable an applicant and a third party infrastructure provider to negotiate infrastructure provision after approvals are granted under the FTAA. The Department Report states:<sup>25</sup>

“The policy intent of this proposal is for conditions to be placed to facilitate the provision of subsequent infrastructure, by allowing the applicant and the relevant local authority or infrastructure provider to negotiate an agreement later (after approvals are granted). It was not to disrupt existing case law and provide a power to the Panel to impose a legal obligation or costs on a third-party. The

<sup>23</sup> [Ministry for the Environment \(Departmental Report, Fast-track Approvals Amendment Bill\) - New Zealand Parliament.](#)

<sup>24</sup> Ibid, beneath paragraph 192.

<sup>25</sup> Ibid, at paragraph 194.

questions raised by submitters show that the current drafting is ambiguous and could be clarified."

[counsel's underlining for emphasis]

42. Accordingly, in a departure from RMA case law, section 84A does not require a decision-maker to be satisfied there is a commitment to an infrastructure upgrade at the time a proposal is being considered (contrast paragraph 34(d) above), but rather that a decision-maker should be able to impose conditions that cause applications to be granted conditionally on subsequent infrastructure (such as roads and services) being **provided** and **completed**, leaving it for the applicant and third party infrastructure provider to negotiate an agreement later.

43. The Departmental Report records the Government Response as follows:<sup>26</sup>

"Officials suggest clarifying that conditions can only be placed on the approval holder (not third-party infrastructure providers), reflecting general case law on the topic of conditions setting."

44. The Departmental Report then describes the Government's Proposed Changes as follows:<sup>27</sup>

"Clarify infrastructure conditions can only be placed on the approval holder (not third party providers)".

45. Accordingly, there is nothing in the Department Report to suggest that section 84A was intended to disrupt existing RMA case law that authorises the use of condition precedents, as raised by the Panel Convener and Associate Panel Convener.

46. Instead, it was Parliament's intent to:

- (a) Clarify that section 84A does not authorise conditions binding third party infrastructure providers; and
- (b) Enable approvals to be granted conditional on subsequent infrastructure provision.

47. The Environment Committee Final Report stated:<sup>28</sup>

**"Clarify that conditions can only be placed on the approval holder**—Clause 46 would insert new section 84A, which would enable a panel to impose a condition to ensure that the infrastructure in the project area, or that a project will rely on, will be made adequate. The Government intends to clarify that these

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<sup>26</sup> Ibid, at paragraph 200.

<sup>27</sup> Ibid, at page 87.

<sup>28</sup> [Fast-track Approvals Amendment Bill Select Committee Report](#), at page 11.

conditions could only be placed on the approval holder, not on third-party infrastructure providers."

[bold text in original, counsel's underlining for emphasis]

48. The Legislative Statement for the Third Reading stated:<sup>29</sup>

"The Bill clarifies expert panels can approve projects conditional on subsequent infrastructure provision. As amended, the Bill further clarifies these conditions can only impose obligations on the applicant, not a third party."

[counsel's underlining for emphasis]

A condition precedent can be lawfully imposed under sections 83 and 84A

49. As mentioned in paragraph 24(c)(ii) above, sections 83 and 84A of the FTAA require that a section 84A condition cannot be "*more onerous than necessary*" to "*ensure that the infrastructure in the project area or other infrastructure the project will rely on is or can be made adequate to support...the project*".
50. A condition precedent is a method that can "*ensure that...other infrastructure the project will rely on is or can be made adequate to support...the project*" without imposing obligations on third party infrastructure providers, because a condition precedent can act to ensure that other infrastructure a project relies on is or can be adequately upgraded to support the project. The only proviso is that if a condition precedent is utilised, then the condition precedent cannot be "*more onerous than necessary*" to achieve the outcome (s83).
51. A condition precedent does not offend the clarification Parliament inserted into section 84A(3) so that a condition may impose an obligation on the applicant only. A condition precedent only imposes an obligation on the applicant to not proceed with something (e.g. developing a stage of a project) until something else has happened (e.g. the required infrastructure for that project is in place and operational). A condition precedent imposes no obligation on a third party to do anything.
52. The Applicant's Memorandum at paragraph 39 mentions that Parliament deliberately amended section 84A from "*ensure that the infrastructure in the project area or other infrastructure the project will rely on is or will be made adequate*" to "*is or can be made adequate*". The Applicant then submits this deliberately shifts the threshold from the Expert Panel needing absolute certainty to only needing to be satisfied as to feasibility.

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<sup>29</sup> [Legislative Statement: Fast-track Approvals Amendment Bill Third Reading presented to the House of Representatives in accordance with Standing Order 272 J.17](#), at page 3

53. While the Council agrees that the word "can" does not require the Panel to be absolutely certain that upgrades are guaranteed, funded or imminent at the time of the Expert Panel's assessment, it submits the word "can" rather than "will" acknowledges that the Expert Panel is unable use section 84A to impose an obligation on a third party to make certain that infrastructure upgrades "will" occur. The word "can" recognises that the Expert Panel is able to use a condition precedent as a mechanism to allow approval to be granted for a project while still ensuring required upgrades "can" occur (for example through negotiations between project proponent and third-party infrastructure provider) prior to a project stage proceeding.

A condition precedent was considered lawful in a draft decision by a differently constituted Expert Panel on another FTAA proposal

54. The FTAA Expert Panel for the Sunfield application (**Sunfield Expert Panel**) recently issued its Draft Decision in which the Expert Panel comments on the validity of condition precedents under section 84A of the FTAA (**Sunfield Draft Decision**).<sup>30</sup>

55. The applicant proposed to the Sunfield Expert Panel several conditions that have the effect of a condition precedent as follows:<sup>31</sup>

- (a) Proposed condition [1A] was to enable subdivision stages to occur in any order, provided necessary infrastructure requirements have been implemented:

"While subdivision and development shall be undertaken on a staged basis as set out in condition [XX], the Consent Holder may stage the subdivision in any order, provided that for any stage the necessary infrastructure requirements (roads, wastewater, water supply, stormwater, electricity and telecommunications) have been implemented."

[Counsel's underlining for emphasis]

- (b) Proposed conditions [120] and [174] took the form of a condition precedent that prevented the occupation of any building until such time that required infrastructure is both constructed and operational:

"The infrastructure required for each stage of the development is set out in the table below. The infrastructure specified for each stage of the development must be constructed and operational prior to any building within that stage being occupied."

[Counsel's underlining for emphasis]

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<sup>30</sup> [Record of Draft Decision of the Expert Consenting Panel for the Sunfield Application under Section 87 of the Fast-Track Approvals Act 2024, dated 10 February 2026.](#)

<sup>31</sup> [The Draft conditions \(tracked changes version\)](#), shows tracked changes recording the amendments made by the Panel to the Applicant's proposed conditions filed on 19 December 2025, as noted in paragraph [3](a) of [Minute 25 of the Expert Panel](#). Unchanged text represents the Applicant's proposed conditions.

56. The substance of the above conditions as proposed by the Applicant were retained in the Expert Panel's tracked changes version of the draft conditions.<sup>32</sup>
57. The Sunfield Expert Panel confirmed that they were satisfied the conditions were valid under section 84A of the FTAA (notwithstanding the Applicant also agreed to be bound by the conditions):<sup>33</sup>

The infrastructure conditions that the Applicant agrees to be bound to are precisely the type of condition that section 84A contemplates. The policy intent that underpins section 84A recognises that an Applicant may need to negotiate an agreement with infrastructure providers after an approval is granted. That is what is happening here. Agreement with Watercare has not yet been reached.

[Counsel's underlining for emphasis]

58. The Sunfield Expert Panel recognised that imposing a condition precedent of the type proposed by the developer (preventing building occupation until infrastructure is constructed and operational) means that the developer carries the risk of proceeding with a project that may not end up with required infrastructure in place by the time buildings are ready to be occupied.<sup>34</sup>

[827] The Applicant is fully cognisant of the risk that Watercare may not agree (in the future) to provide the infrastructure required to service Sunfield. The Applicant fully acknowledges that this is a developer's risk, and it is clearly a risk that it is prepared to take.

...

[829] The Panel cannot, through conditions of a resource consent, compel Watercare to provide new connections, commit funding for infrastructure, or accept the vesting of assets.

...

[833] ...the Panel apprehends that Sunfield and Watercare will need to enter into commercial negotiations to overcome all of Watercare's objections to providing three-waters infrastructure. That may come at a significant cost to Sunfield, but Sunfield has acknowledged that that is a risk it is prepared to take.

### **What is the relevance and correct interpretation of s84A in relation to the delivery, timing and funding of the Intersection Upgrades?**

59. Paragraphs 53 to 58 of the Applicant's Memorandum responds to the Expert's Panel's query and concludes that:

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<sup>32</sup> Ibid.

<sup>33</sup> [Record of Draft Decision of the Expert Consenting Panel for the Sunfield Application under Section 87 of the Fast-Track Approvals Act 2024, dated 10 February 2026](#) at paragraph 826.

<sup>34</sup> Ibid.

*"Section 84A requires conditions to be framed as applicant-only obligations and was implemented so that projects were not dependent on certainty for third-party delivery, timing, or funding. The correct approach is to use time-based staging and an offer by the Applicant for proportionate contributions when the evidence shows the infrastructure can be made adequate within the expected timeframe, recognising that completion ultimately depends on the relevant public agencies progressing their own programmes."*

60. In keeping with the Applicant's views on section 84A, the Applicant volunteered the following condition 3 as part of its section 55 response dated 19 December 2025:<sup>35</sup>

- "a) The issue of Titles for Stage 1 (Lots 1-72, 400 and 401 shall not occur until 31 December 2027).
- b) Titles for Stage 2 or beyond shall not be issued until the sooner of:
  - i. 01 January 2029; or
  - ii. A Developer Agreement is entered into with Council and / or the NZ Transport Agency to facilitate the State Highway 1 / Pound Road and Pound Road / intersection and Pound Road / Waterloo Road intersection upgrades.
- c) The Consent Holder shall provide a contribution towards the construction of the SH1 / Pound Road intersection and Pound Road / Waterloo Road intersection upgrades (including the rail crossing), on the basis of the traffic generated through these intersections and costs of the intersection designs submitted with the application and included in the ITA."

61. While the Council agrees that section 84A requires conditions to be framed as applicant-only obligations, it **disagrees** with the Applicant's view that:

- (a) Section 84A was implemented so that *projects* are not dependent on certainty for third-party delivery, timing or funding; and
- (b) The use time-based staging and an offer by the Applicant for proportionate contributions (as then set out in volunteered condition 3) is appropriate and in keeping with what section 84A anticipates.

Was section 84A implemented so that projects are not dependent on certainty for third-party delivery, timing or funding?

62. Section 84A was not implemented so that **projects** are not dependent on certainty for third-party delivery, timing or funding. Rather, section 84A was implemented so that **approvals** for projects are not dependent on certainty for third-party delivery, timing or funding. A condition precedent under section 84A can be used to ensure the project

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<sup>35</sup> [Appendix 2](#) of the Memorandum of counsel accompanying the Applicant's reply under s 55 of the FTAA dated 19 December 2025.

remains dependent on the provision of adequate supporting infrastructure that the project will rely on.

63. As set out above, it was Parliament's intention (as now carried over into section 84A as enacted) to clarify that Expert Panels can **approve** projects conditional on subsequent infrastructure provision.
64. The Sunfield Expert Panel confirmed in the Sunfield Draft Decision that a condition precedent is precisely the type of condition section 84A contemplates, in that it recognises that an Applicant may need to negotiate an agreement with infrastructure providers after an approval is granted. Accordingly, a project can be granted **approval**, while the project itself remains conditional on subsequent infrastructure provision (following successful negotiations of an agreement with third party infrastructure providers).
65. Section 84A recognises that while **approvals** need not be held up by uncertainty associated with third-party delivery, timing or funding of infrastructure, the actual project itself can be held up from actual fruition if required infrastructure is not yet in place. For example, as mentioned at paragraph 58 above, if approval is given subject to a condition precedent that allows a project to proceed without infrastructure in place, but which prevents actual occupation (or use) of buildings until infrastructure is in place, then the developer carries the risk of proceeding with a project that may not end up with required infrastructure in place by the time buildings are ready to be occupied (or used), as a third party infrastructure provider cannot be compelled by conditions to provide required infrastructure.

Is the Applicant's volunteered condition 3 appropriate and in keeping with section 84A?

66. It is submitted that the Applicant's volunteered condition 3 is neither appropriate nor in keeping with section 84A of the FTAA.
67. Condition 3(b)(i) would allow titles for stage 2 to issue from 1 January 2029 even if there are no required infrastructure upgrades in place and no Development Agreement for required infrastructure upgrades to be put in place at some point. That is inappropriate as it results in adverse impacts (traffic externalities) from the Proposal being borne by the environment (people, communities, road users) without required upgrades in place. It also leaves it to the public (ratepayers and/or taxpayers) to bear the full cost for infrastructure upgrades to address those externalities, amounting to a publicly borne subsidy for the Proposal. This is inconsistent with Parliamentary history

confirming there was no intention to empower the Expert Panel to impose costs on a third party (see paragraph 41 above).

68. Imposing a condition precedent that avoids that significant problem fits squarely within section 84A of the FTAA, which was enacted to enable the Expert Panel to "*ensure*" (i.e make certain to happen) that infrastructure the project will rely on is or can be made adequate to support the project.
69. Other problems which make the Applicant's volunteered condition 3 inappropriate and/or not in keeping with section 84A of the FTAA include:
  - (a) Subclause (b)(ii) lacks certainty and clarity to "ensure" that all roading infrastructure the project will rely on is or can be made adequate to support the project. Amongst other things, the subclause provides no clarity for ensuring the completion and operation of required upgrades are timed to occur prior to titles being issued. Without such clarity, adverse impacts would be able to commence without the necessary upgrades in place.
  - (b) Subclause (c) lacks certainty and clarity regarding the amount of contribution the applicant will provide toward the upgrades.
  - (c) Condition 3 refers to withholding the issuing of titles. However, the ability to withhold the issuing of titles is not a matter within the control of the applicant or even a consent authority, but is a matter for the Registrar-General of Land. A condition requiring the withholding of titles being issued effectively purports to impose an obligation on a third party, which is not authorised by section 84A(3) of the FTAA.



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BK Pizzey  
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4 March 2026